

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MANUEL M. SOARES,
CDCR #F-39579,

Plaintiff,

vs.

DANIEL PARAMO, Warden;
G. STRATTON, Assoc. Warden;
M. FLYNN, Correctional Counselor;
JAN HANSSON, Psychiatrist;
EMMA PHAN, Psychologist,

Defendants.

Civil No. 13cv0803 BTM (WMc)

ORDER:

**(1) DENYING PLAINTIFF'S
MOTION TO STAY
(ECF Doc. No. 11)**

**(2) DISMISSING CIVIL ACTION
WITHOUT PREJUDICE FOR
CONCESSION OF FAILURE TO
EXHAUST ADMINISTRATIVE
REMEDIES PRIOR TO SUIT
PURSUANT TO 42 U.S.C. § 1997e(a)**

AND

**(2) DENYING PLAINTIFF'S
MOTIONS TO PROCEED *IN
FORMA PAUPERIS* AS MOOT
(ECF Doc. Nos. 10, 16)**

Plaintiff, an inmate currently incarcerated at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California, initiated this civil action by filing a letter addressed to the Honorable Thelton E. Henderson in the Northern District of California on March 30, 2013 (ECF Doc. No. 1).

Because Plaintiff's letter alleged that he had been involuntarily transferred without due process from RJD to Atascadero State Hospital ("ASH") based on false claims of mental illness,

1 Judge Henderson found venue properly lay in the Southern District of California, and transferred
 2 the case here pursuant to 28 U.S.C. §§ 84(b), 1391(b) and 1406(a). *See* Order of Transfer (ECF
 3 Doc. No. 4) at 1-2.

4 Once the case was transferred here, Plaintiff sought and was granted an extension of time
 5 in which to file a Motion to Proceed *In Forma Pauperis* (“IFP”) (ECF Doc. Nos. 7, 8). On April
 6 23, 2013, Plaintiff filed a formal Complaint pursuant to 42 U.S.C. § 1983 (ECF Doc. No. 9), a
 7 Motion to Proceed IFP (Doc. No. 10),¹ and a Motion to Stay the proceedings “until exhaustion
 8 of administrative remed[ies].” *See* ECF Doc. No. 11 at 2. On July 14, 2013, Plaintiff also
 9 submitted a “Motion for Order Requiring Response” in which he requested a Court order
 10 compelling Defendants to “respond to [his] administrative [CDC] 602 appeal (Log #RJD HC
 11 13047781) or in the alternative, allow [him] to proceed [with his] complaint under 42 U.S.C.
 12 § 1983. *See* ECF Doc. No. 18 at 1. On July 23, 2013, however, Plaintiff submitted a letter to
 13 the Court requesting withdrawal of his July 14, 2013 Motion because he had, on July 21, 2013
 14 “received a [2d level] response to [his] administrative appeal and will be submitting this matter
 15 to the third (and final) level in Sacramento.” *See* ECF Doc. No. 20.

16 **I. SCREENING AND DISCUSSION**

17 Pursuant to 28 U.S.C. § 1915A, enacted as part of the Prison Litigation Reform Act
 18 (“PLRA”), “the court shall review, ... as soon as practicable after docketing, a complaint in a
 19 civil action in which a prisoner seeks redress from a governmental entity or officer or employee
 20 of a governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify
 21 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint (1)
 22 is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 23 monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). “Among
 24 other reforms, the PLRA mandates early judicial screening ... and requires prisoners to exhaust
 25 prison grievance procedures before filing suit.” *Jones v. Bock*, 549 U.S. 199, 202 (2007).

26 Because Plaintiff is a prisoner, as defined by 28 U.S.C. § 1915A(c), the Court has
 27 reviewed his Complaint pursuant to § 1915A(a), as well as his Motions for Stay, and for an
 28

¹ Plaintiff filed a second Motion to Proceed IFP on May 23, 2013 (ECF Doc. No. 16).

1 Order Requiring Response, and all exhibits attached thereto, and finds it clear Plaintiff's case
 2 must be dismissed because he has conceded his failure to exhaust all available administrative
 3 remedies prior to commencing this action. *See Wyatt*, 315 F.3d at 1120 (noting that "[a]
 4 prisoner's concession to non-exhaustion is a valid ground for dismissal.")

5 The PLRA amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with
 6 respect to prison conditions under section 1983 of this title, or any other Federal law, by a
 7 prisoner confined in any jail, prison, or other correctional facility until such administrative
 8 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The requirement is mandatory
 9 and unequivocal. *Booth v. Churner*, 532 U.S. 731, 741 (2001); *McKinney v. Carey*, 311 F.3d
 10 1198, 1200 (9th Cir. 2002) ("Congress could have written a statute making exhaustion a
 11 precondition to judgment, but it did not. The actual statute makes exhaustion a precondition to
 12 suit.").

13 A prisoner who seeks to challenge the conditions of his confinement brings an action for
 14 purposes of 42 U.S.C. § 1997e "when the complaint is tendered to the district clerk." *Vaden v.*
 15 *Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006). Therefore, a prisoner must exhaust available
 16 administrative remedies *before* filing any papers in federal court and is not entitled to a stay of
 17 judicial proceedings in order to exhaust.² *Id.* at 1051; *McKinney*, 311 F.3d 1198 (rejection
 18 prisoner's claim that the court should have entered a stay which would have provided an
 19 opportunity for exhaustion, and concluding that "[e]xhaustion subsequent to the filing of suit
 20 will not suffice."). *See also Rhodes v. Robinson*, 621 F.3d 1002, 1006-07 (9th Cir. 2010)
 21 (clarifying that the rule of *Vaden* and *McKinney* does not apply to new claims raised in a
 22 *supplemental* pleading, permitted by the Court pursuant to FED.R.CIV.P. 15(d), which permits
 23 the party to allege new claims arising after the date the initial pleadings were filed).

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 26 ² Prior to amendment by the PLRA, 42 U.S.C. § 1997e authorized district courts to stay a state
 27 prisoner's § 1983 action "for a period of not to exceed 180 days" while he exhausted available "plain,
 28 speedy, and effective administrative remedies." § 1997e(a)(1). *See Porter v. Nussle*, 534 U.S. 516,
 522-23 (2002). "Exhaustion ... was in large part discretionary; it could be ordered only if the State's
 prison grievance system met specified federal standards, and even then, only if, in the particular case,
 the court believed the requirement "appropriate and in the interests of justice." *Id.* at 523 (citing 42
 U.S.C. §§ 1997e(a) and (b)).

1 The State of California provides its prisoners and parolees the right to appeal
 2 administratively “any policy, decision, action, condition, or omission by the department or its
 3 staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or
 4 her health, safety, or welfare.” CAL. CODE REGS. tit. 15, § 3084.1(a). In order to exhaust
 5 available administrative remedies within this system prior to January 28, 2011, a prisoner had
 6 to proceed through four levels of appeal: (1) informal resolution, which required a prisoner to
 7 submit a CDC 602 inmate appeal form (captioned “Inmate/Parolee Appeal Form”); (2) first level
 8 formal written appeal; (3) second level written appeal to the institution head or designee; and (4)
 9 third level written appeal to the Director of the California Department of Corrections and
 10 Rehabilitation (“CDCR”). *See Woodford v. Ngo*, 548 U.S. 81, 85–86 (2006); *see also* CAL.
 11 CODE REGS. tit. 15, §§ 3084.1–3084.9.³ A final decision from the Director’s level of review
 12 satisfies the exhaustion requirement under 42 U.S.C. § 1997e(a). *See Lira v. Herrera*, 427 F.3d
 13 1164, 1166–67 (9th Cir. 2005); *see also* CAL. CODE REGS. tit. 15, § 3084.7(d)(3) (as amended
 14 Dec. 13, 2010).

15 In the sworn Declaration Plaintiff proffers in support of his Complaint, Plaintiff alleges
 16 his due process rights were violated in November 2012 when he was “brought before a *Vitek*
 17 committee for consideration of a transfer to a mental hospital,” but was not provided “prior
 18 written notice,” “any written disclosure ... as to the evidence or reasons why [he] was being
 19 considered for transfer,” or an “independent or qualified person to act in [his] best interest at
 20 th[e] hearing.” (ECF Doc. No. 9 at 5.)

21 In *Vitek v. Jones*, 445 U.S. 480, 493-96 (1980), the Supreme Court held that an
 22 involuntary transfer of a state prisoner to a state mental hospital implicated his liberty interests
 23 under the Due Process Clause of the Fourteenth Amendment sufficient to require certain
 24 procedural safeguards prior to transfer. *Id.*

25 They include:

26 ... written notice to the prisoner that a transfer to a mental hospital
 27 is being considered; [] a hearing, sufficiently after the notice to

28 ³ Effective January 28, 2011, the informal resolution level was eliminated. *See* CAL. CODE
 REGS. tit. 15, § 3084.7 (as amended Dec. 13, 2010).

1 permit the prisoner to prepare, at which disclosure to the prisoner
 2 is made of the evidence being relied upon for the transfer and at
 3 which an opportunity to be heard in person and to present
 4 documentary evidence is given; ... [a]n opportunity at the hearing to
 5 present testimony of witnesses by the defense and to confront and
 6 cross-examine witnesses called by the state, except upon a finding,
 not arbitrarily made, of good cause for not permitting such
 presentation, confrontation, or cross-examination; ... “[a]n
 independent decision-maker; and ... [a] written statement by the
 factfinder as to the evidence relied on and the reasons for
 transferring the inmate.

7 *Id.* at 494-95.⁴

8 At the same time, however, when asked on his form Complaint whether “the last level
 9 to which [he] appealed [his administrative remedies] [was] the highest level of appeal available,”
 10 (Compl. at 2), Plaintiff has checked the “No” box, explaining that “Defendants have not
 11 answered any of [his] appeals or requests in this matter,” and referring the Court to his sworn
 12 Declaration and his own Exhibit D. (Compl. at 2.) Plaintiff’s Exhibit D is comprised of what
 13 appear to be several separate CDCR Form 602 grievances and responses, each identified with
 14 “Tracking/Log #RJD HC 13047781,” and dated at various times ranging from January 11, 2013
 15 through March 29, 2013. In his Declaration, Plaintiff admits to have initiated the administrative

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 17 ⁴ Pursuant to *Vitek*, CAL. CODE REGS., tit. 15 § 3369.1(a) provides that California inmates
 18 “considered for placement in a Department of Mental Health hospital pursuant to Penal Code section
 2684 shall be informed of their rights to a hearing on the placement and to waive such a hearing.” *Id.*
 Unless inmates waive the hearing, or require emergency psychiatric hospitalization, they are provided:

- 19 (1) A written notice of the placement hearing at least 72 hours
- 20 prior to the hearing.
- 21 (2) An independent and qualified staff member to assist the inmate
- 22 with their preparation for the hearing. Any costs or expenses
- 23 incurred related to independent assistance obtained by the inmate
- on their own shall be the sole responsibility of the inmate.
- 24 (3) An opportunity to present documentary evidence and the oral
- 25 or written testimony of witnesses, and to refute evidence and cross-
- 26 examine witnesses unless the hearing officer indicates a good cause
- 27 for prohibiting such evidence or witnesses.
- (4) A hearing officer who shall be the institution head or a
- designee, which shall be a correctional administrator, physician,
- psychiatrist, or psychologist who is not involved with treating the
- inmate.
- (5) A copy of the written decision within 72 hours after the
- hearing, which shall include the reason for the decision and the
- evidence, relied upon in making the decision.

28 CAL. CODE REGS., tit. 15 § 3369.1(a) (1)-(5).

1 appeal process “without response,” and asks the Court to “Order the Defendants to answer
2 Appeal Log. No. RJD HC 13047781.” *See* Pl.’s Decl. in Support of Claim (Compl. at 9).

3 In his Motion to Stay, Plaintiff also refers to the sworn Declaration attached to his
4 Complaint, as well as his Exhibit D, and claims that while he “had filed three administrative
5 appeals,” prison officials had “screen[ed] [them] out.” *See* Pl.’s Mot. (ECF Doc. No. 11) at 1-2.
6 Plaintiff requests a stay, however, because on April 8, 2013, he received a “First Level HC
7 Appeal” Notice as to Appeal Log # RJD HC 13047781, which indicated that his appeal had, in
8 fact, been “assigned to the Health Care Appeals Office for [a] response,” which was due by May
9 6, 2013. *Id.* In his later letter to the Court, filed on July 25, 2013, Plaintiff makes clear that as
10 of July 21, 2013, he had since received a Second Level Response to Log No. RJD HC 13047781,
11 and “will be submitting this matter to the Third (and final) level in Sacramento.” (ECF Doc. No.
12 20 at 1.)

13 Based on these submissions and Plaintiff’s own sworn allegations, the Court finds that
14 he has conceded his failure to exhaust all administrative remedies as available pursuant to 42
15 U.S.C. § 1997e(a) *prior* to initiating this suit. *See Vaden*, 499 F.3d at 1051; *Wyatt*, 315 F.3d at
16 1120. The “exhaustion requirement does not allow a prisoner to file a complaint addressing
17 non-exhausted claims, even if the prisoner exhausts his administrative remedies while his case
18 is pending.” *Rhodes*, 621 F.3d at 1004 (citing *McKinney*, 311 F.3d at 1199).

19 Accordingly, Plaintiff’s Motion for Stay must be denied and this action must be dismissed
20 without prejudice to Plaintiff re-filing a new and separate civil action *after* he has fully complied
21 with 42 U.S.C. § 1997e(a)’s exhaustion mandate. *See Wyatt*, 315 F.3d at 1120 (a dismissal for
22 failure to exhaust administrative remedies is without prejudice).

23 **II. CONCLUSION AND ORDER**

24 Good cause appearing, IT IS HEREBY ORDERED:

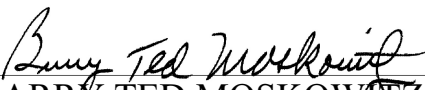
- 25 1. Plaintiff’s Motion for Stay (ECF Doc. No. 11) is DENIED;
- 26 2. Plaintiff’s action is DISMISSED without prejudice based on his conceded failure
27 to exhaust administrative remedies prior to suit pursuant to 42 U.S.C. § 1997e(a);

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1 3. Plaintiff's Motions to Proceed IFP (ECF Doc. Nos. 10, 16) are DENIED as moot;
2 and

3 4. The Clerk of Court shall enter a final dismissal of this action without prejudice and
4 close the case.

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6 DATED: September 12, 2013

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8 BARRY TED MOSKOWITZ, Chief Judge
9 United States District Court
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